Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1491

JOSEPH H. SEYMOUR, C. WILLIAM BURKE, RICHARD L. CORBIT, *et al.*,

(Complete Title on Inside Cover)

Petitioners,

vs.

COUGHLIN COMPANY, a California corporation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioners,

vs.

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IN THE

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No._____

JOSEPH H. SEYMOUR, C. WILLIAM BURKE, RICHARD L. CORBIT, JOHN L. CONNOLLY, HAROLD EDWARDS, HOWARD C. DENNIS, DONALD E. MIER, ALEXANDER RADOS, WILLIAM SCHMIDT, WILLIAM C. WAGGONER, JERALD B. LAIRD and RICHARD GANNON, each in his respective capacity as Trustee of the Operating Engineers Health and Welfare Fund; JOSEPH H. SEYMOUR, JOHN L. CONNOLLY, RICHARD L. CORBIT, C. V. HOLDER, HAROLD EDWARDS, HOWARD C. DENNIS, DONALD E. MIER, JAMES J. KIRST, WILLIAM C. WAGGONER, JOHN C. MAXWELL, C. WILLIAM BURKE, RICHARD GANNON, KENNETH J. BOURGUIGNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust; JOSEPH H. SEYMOUR, HOWARD C. DENNIS, RICHARD L. CORBIT, C. WILLIAM BURKE, HAROLD EDWARDS, ALEXANDER RADOS, DONALD E. MIER, C. IRWIN T. JOHNSON, WILLIAM C. WAGGONER, JAMES J. KIRST, RICHARD GANNON and JERALD B. LAIRD, each in his respective capacity as Trustee of the Operating Engineers Vacation-Holiday Savings Trust; JOSEPH H. SEYMOUR, ALEXANDER RADOS, RICHARD L. CORBIT, WILLIAM SCHMIDT, RICHARD GANNON, HOWARD C. DENNIS, JERRY TRENT, ROBERT R. MOODIE, ALAN ROBERTS, C. IRWIN T. JOHNSON, A. PAUL SCHENK and HAROLD EDWARDS, each in his respective capacity as Trustee of the Southern California Operating Engineers Apprentice Training Trust,

Petitioners,

vs.

COUGHLIN COMPANY, a California corporation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, the above named Trustees of the Operating Engineers Health and Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust, and Southern California Operating Engineers Apprentice Training Trust, join herein and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 5, 1979, in Case No. 76-3701 of that Court.

Opinions Below.

The opinion of the Court of Appeals is reported at 609 F.2d 346 and appears at Appendix A of this petition. The findings of fact and conclusions of law made by the U.S. District Court for the Central District of California are not officially reported and appear at Appendix B of this petition. The judgment granting motion for summary judgment filed and entered in the district court is not officially reported and appears at Appendix C of this petition.

Jurisdiction.

The opinion of the Court of Appeals was filed on October 5, 1979. Upon the filing of a timely petition for rehearing and suggestion for a rehearing *en banc* by the petitioners, the Court of Appeals filed an order on December 28, 1979, denying the petition for rehearing and rejecting the suggestion for rehearing *en banc*. The order filed December 28, 1979, appears at Appendix D of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. May a collective bargaining agreement automatically expire by its own terms without a written notice from one party to the other at least sixty days in advance as required by section 8(d) of the National Labor Relations Act, 29 U.S.C. §158(d)?

2. Was summary judgment that the collective bargaining agreement automatically expired erroneously granted when extrinsic evidence showed that the collective bargaining agreement was intended to remain in effect unless Local 12 or Coughlin Company gave written notice to the other at least sixty days before the end of the term of the related Master Labor Agreement?

Statutes Involved.

The first question presented by this petition involves section 8(d) of the National Labor Relations Act, 61 Stat. 142-143, 29 U.S.C. §158(d), which provides in relevant part:

> " . . . [W]*here there is in effect a collective-bargaining contract* covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that *no party to such contract shall terminate or modify such contract, unless the party* desiring such termination or modification —
>
> (1) *serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof,* or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) *offers to meet and confer* with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) *notifies the Federal Mediation and Conciliation Service* within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) *continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later; . . .*'' (Emphasis added.)

Statement of the Case.

The jurisdiction of the district court was invoked to enforce obligations to pay fringe benefit contributions under a collective bargaining agreement as authorized by section 301(a) of the Labor-Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. §185(a).

In 1967, respondent Coughlin Company (''Coughlin'') executed a ''short form'' collective bargaining agreement with the International Union of Operating Engineers, Local Union No. 12 (''Local 12''). The short form agreement incorporated substantially all of the terms, including those governing fringe benefit contributions, of the Master Labor Agreement (''MLA''), a multiple employer collective bargaining agreement negotiated between Local 12 and the Southern California General Contractors Associations (''Associations''). The MLA had a term of four years to July 1, 1969, and from year to year thereafter unless one

party gave to the other a written notice sixty days in advance of its desire to ''change, amend, modify or terminate'' the MLA.

More than sixty days prior to July 1, 1969, Local 12 gave timely written notice to the Associations of its desire to negotiate modifications to the terms of the MLA. *Neither Local 12 nor Coughlin gave written notice to the other party of a desire to terminate or modify the short form agreement between them. App.* A, p. 2. *App.* B, p. 12.

Petitioners, the joint labor-management boards of trustees of the Operating Engineers Trusts (''Trustees''), filed this action on March 25, 1975, in the district court to enforce payment of contributions due to the Trustees under Coughlin's collective bargaining agreement. Coughlin's answer to the complaint raised eleven affirmative defenses, including an allegation that the collective bargaining agreement ''was cancelled and rescinded . . . in approximately August of 1968,'' RA:42, lines 11-14.[1] In pretrial preparation, Coughlin raised a contention that its short form agreement did not incorporate the MLA as modified effective June 30, 1969. RA:92-93. The pretrial conference order prepared jointly by the parties and signed by the district court on July 20, 1976, preserved the question whether in the absence of Coughlin providing Local 12 a sixty day written notice of termination of the shortform agreement, the short form agreement continued to incorporate by reference the terms of the MLA in effect from July 1, 1969, through July 1, 1974. RA:107, lines 25-30.

After the pretrial conference, the parties stipulated, and the district court ordered, that motions for summary judgment be filed. RA:111-113.

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[1] ''RA:'' references are to the Record on Appeal in the Court of Appeals, followed by designation of page and lines.

The Trustees then filed a motion for summary judgment, relying on the language of the short form agreement, but also relying on extrinsic evidence that the agreement remained in effect and incorporated the terms of the modified MLA in the absence of a written notice of termination by Coughlin or Local 12 to the other. The extrinsic evidence included:

(1) An admission in deposition testimony by D.W. Coughlin, president of Coughlin Company, to the effect that the "short form" agreement remained in effect on July 27, 1970; RA:136, lines 3-12.

(2) The affidavit of a Local 12 official establishing that Local 12 is party to short form agreements similar to Coughlin's with numerous other employers, that such employers remain bound to the agreement unless a timely notice of termination is given by the employer to Local 12, and that no written notice of termination was received by Local 12 from Coughlin; RA:151, lines 24-32; 152, lines 1-5.

(3) The affidavit of the Trustees' administrator establishing that in August, 1970, Coughlin filed a written report with the Trustees showing employment of an operating engineer under the "short form" agreement during the months of October, November and December, 1969, and paid contributions to the Trustees at the increased hourly rates established by the modified MLA in effect at that time; RA:135, lines 15-27; 261; 393, lines 13-22.

These facts are uncontroverted in the record.

At the hearing on the motions for summary judgment, the district court stated a tentative ruling that the short form agreement automatically expired on June 30, 1969, even in the absence of a written notice of termination sixty days in advance. The district court then allowed seven days within

which the Trustees might file objections to the findings of fact and conclusions of law proposed by Coughlin. TR:16, lines 15-25; 17.[2] The Trustees filed timely objections to the proposed findings and conclusions, requested a further hearing on the findings and conclusions (RA:429, line 15; 430, lines 1-5), and provided a full briefing of section 8(d) of the National Labor Relations Act, 29 U.S.C. §158(d). RA:436-438. The district court held no further hearing, but prepared its own findings and conclusions, adopting certain of the Trustees' proposals and rejecting others. The district court found that neither Local 12 nor Coughlin had given written notice to the other of a desire to terminate or modify the short form agreement (*App*. B, p. 12) and, in addition, found that after July 1, 1969, Coughlin requested that Local 12 dispatch a workman to Coughlin, and Coughlin thereafter reported hours and paid contributions to the Trustees on behalf of that workman in accordance with the modified MLA then in effect. *App*. B, p. 12. However, the district court concluded that the short form agreement automatically expired on June 30, 1969, because the MLA was modified in negotiations and, therefore, was "new" and not a "renewal or extension" of the MLA. *App*. B, pp. 13-14. Judgment was entered accordingly.

The Court of Appeals affirmed, refusing to reach the merits of the effects of section 8(d) of the NLRA on expiration of the collective bargaining agreement without a notice of termination on grounds that section 8(d) had not been raised timely in the district court. *App*. A, p. 3. The Court of Appeals then proceeded to construe the short form agreement as if the Trustees relied only upon the language

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[2] "TR:" references are to the court reporter's official transcript of proceedings in the district court, followed by designation of page and lines.

of the agreement itself, and found insufficient basis in that language to disagree with the interpretation reached by the district court.[3] The Court of Appeals agreed with the district court's ''more reasonable'' interpretation of the short form agreement ''although the parties could perhaps have more clearly expressed their intent'' (*App*. A, pp. 6-7), and distinguished other cases involving similar short form agreements with automatic renewal provisions. *App*. A, pp. 8-10. The Court of Appeals then merely mentioned the conduct of Coughlin in continuing to observe the terms of the modified MLA after July 1, 1969, as ''not sufficient to demonstrate that the district judge erroneously construed the agreement.'' *App*. A, p. 10.

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[3]Article II of the short form agreement provides in part:

''The EMPLOYER, not being signatory to any recognized Operating Engineers multiple-employer agreement, hereby *agrees to accept and be bound by all of the terms and conditions of multiple-employer agreements* applicable to the EMPLOYER'S operations and in effect in the area in which the work is performed *as recognized, modified and renewed from time to time* through collective bargaining between the UNION and the applicable multiple-employer group.'' (Emphasis added.)

Article V of the short form agreement provides:

''This Agreement shall become effective as of the date shown above and *shall continue in effect for the same term as the applicable multiple-employer labor agreements and for any renewals or extensions thereof, unless either party shall given written notice to the other party*, at least sixty (60) days prior to the termination date of the appropriate multiple-employer agreement, of its desire to terminate.'' (Emphasis added.)

REASONS FOR GRANTING THE WRIT.

In concluding that the existing collective bargaining agreement automatically expired without a written notice of intent to terminate or modify given by one party to the other at least sixty days in advance, the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court; and, the Court of Appeals' decision of that important question of federal law is based upon reasoning which seriously conflicts in principle with applicable decisions of this Court. Review of the Court of Appeals' decision should be granted for these reasons, as discussed below:

1. This Unprecedented Holding That a Collective Bargaining Agreement Expired Automatically, Without Written Notice From One Party to the Other and Despite Subsequent Compliance With Its Terms, Severely Disrupts the Stability of Existing Labor Contracts.

The decision of the Court of Appeals overturns long standing practices and stable contractual relations between many labor unions and tens of thousands of employers in California alone, as well as throughout the Ninth Circuit and the reaches of its influence in the nation. Without considering the merits of a federal statute expressly controlling the subject [29 U.S.C. §158(d)], the Court of Appeals held that a ''short form'' collective bargaining agreement of the type commonly used by many labor unions expired and became a nullity without either party giving to the other a written notice of termination. Local 12 alone has such agreements with approximately 5,000 employers, and under the Court of Appeals' decision Local 12 would be faced with signing new agreements with each employer at least initially and, for added assurance, whenever the MLA is modified.

Other labor unions can take little comfort in the particular language of their own short form agreements, because the Court of Appeals, in truth, swept aside the logical interpretation incorporating the MLA "as recognized, modified and renewed from time to time" in favor of an interpretation designed to protect the employer from being bound to terms yet to be negotiated by the employer associations.

The disruption of stable labor relations would be *retroactive*, as in this case, as well as prospective. Collective bargaining parties who have considered themselves bound and covered continuously by short form agreements signed many years ago would have those agreements expunged and invalidated retroactively at the first date on which the incorporated master labor agreement was modified. One important effect of such a result is that fringe benefit contributions paid to Taft-Hartley trusts during past years will have been made without the statutorily required coverage of a written collective bargaining agreement, thereby making unlawful the payment of benefits to the employees involved. *Walsh v. Schlecht*, 429 U.S. 401, 407, 97 S.Ct. 679, 684 (1977). The decision below will cause great expense and labor strife in signing new short form agreements, and will add new caseload burdens as parties seek to litigate an issue previously regarded as settled.

2. This Court Should Not Permit the Court of Appeals' Decision to Stand at Cross Purposes With the Explicit Provisions of Section 8(d) of the National Labor Relations Act.

This Court has said that a collective bargaining agreement ". . . must be read as a whole and in the light of the law relating to it when made." *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 279, 76 S.Ct. 349, 356 (1956). The law relating to termination of collective bargaining

agreements when Coughlin signed the short form agreement included section 8(d), which this Court has construed as follows:

> "[T]he party desiring to make a modification or termination is required to serve a written notice on the other party, offer to meet and confer, notify mediation and conciliation agencies if necessary, and meanwhile maintain contract relations." *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187, 92 S.Ct. 383, 401-402 (1971).

The Court of Appeals construed the short form agreement as having expired automatically without any of these things being done, thereby giving the words of the agreement a clearly unlawful meaning. In contrast, this Court has interpreted such labor agreements by applying the "general rule of construction [which] presumes the legality and enforceability of contracts", stating:

> ". . . ambiguously worded contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable." *Walsh v. Schlecht, supra*, 429 U.S. 408, 97 S.Ct. 685.

Rather than apply these rules, the Court of Appeals refused to consider the merits of whether section 8(d) of the NLRA will permit a collective bargaining agreement to expire without a timely written notice on grounds that Coughlin "may" have been prejudiced by the Trustees' failure to raise the statute at an earlier point in the district court proceedings. In so ruling, the Court of Appeals relied primarily on *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978), which concerned an issue never raised in the lower court and, more importantly, involved a completed jury trial in a criminal case. In contrast, the Trustees fully briefed the section 8(d) issue in the district court after a tentative ruling

on summary judgment indicated that extrinsic evidence of contractual intent would be ignored and before the district court's consideration of findings and conclusions. Coughlin could not be prejudiced by consideration of section 8(d) in the district court, in the Court of Appeals or in this Court. A private party is not entitled to be free from the requirements and policy of a federal statute and, therefore, can suffer no prejudice by the proper application of that law. Adjudicative facts "not subject to reasonable dispute" must be judicially noticed "at any state of the proceeding" [F.R.Evid., Rule 201(f)], including original judicial notice in the appellate court. 10 *Moore's Federal Practice* §201.60. *Weinstein's Evidence,* ¶201[06]. The courts have at least equal access to consideration of federal statutes. 10 *Moore's Federal Practice* §201.02[1].

Even in the absence of the district court's reversible error in disregarding the extrinsic evidence of contractual intent, a trial court is not entitled to disregard controlling provisions of federal statutes reflecting important public policy when the court has not yet completed findings of fact and conclusions of law or entered judgment. Particularly this is so in the context of summary judgment proceedings, when there has been no trial testimony of live witnesses and Coughlin has presented no evidence except an unrelated declaration of counsel. RA: 426.

Most importantly, published precedent holding that an existing collective bargaining agreement has expired and become a nullity without written notice of termination between the parties should not be permitted to stand if a federal statute expressly prohibits that result. If, indeed, section 8(d) does require a written notice to terminate the short form agreement, the Court of Appeals decision undoubtedly encouraging many parties to conduct themselves otherwise cannot be justified. By failing to consider section 8(d), the

decision of the Court of Appeals *at least* runs the risk of acting directly at cross purposes with a federal statute which is a cornerstone of stability in collective bargaining relations.

3. The Trustees Presented Uncontroverted Extrinsic Evidence in the District Court Proving That the Short Form Collective Bargaining Agreement Was Intended to Remain in Effect, Despite Modification of the Master Labor Agreement, Unless Coughlin Gave Timely Written Notice of Termination.

This Court has held, regarding the proper approach to interpreting a collective bargaining agreement, as follows:

> "In order to interpret such an agreement, it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." *Transportation-Communication Employees Union v. Union Pacific Railroad Company,* 385 U.S. 157, 161, 87 S.Ct. 369, 371 (1966).

Therefore, in moving for summary judgment in the district court, the Trustees did not rely solely upon the plain language of the short form agreement to establish that the agreement remained in effect after July 1, 1969. The Trustees presented extrinsic evidence of the intent, practices and customs of the parties regarding that issue as follows:

(1) The admission in deposition testimony by Coughlin's president and principal stockholder, who signed the short form agreement, that the agreement was still in effect on July 27, 1970, and that Coughlin was still obligated then and thereafter to pay contributions to the Trusts on its operating engineer employees. RA:136; Deposition of Donald Wallace Coughlin taken on July 15, 1975, p. 16.

(2) The affidavit of the Trustees' administrator establishing that Coughlin reported an employee to the Trustees after July 1, 1969, and paid contributions on that employee at the increased rates set by the terms of the modified MLA. RA:250, lines 12-18; *App.* A, p. 2.

(3) The affidavit of a Local 12 official establishing that Local 12 has many similar short form collective bargaining agreements with other employers, and the practice of the parties to those agreements is to treat the agreements as continuing in effect after modification of the incorporated MLA unless the employer signatory to the short form agreement has given a timely written notice of termination to Local 12. RA:151-152.

Such practices and intent under short form agreements have often been reflected in reported decisions of the courts. *Waggoner v. C & D Pipeline Company*, 601 F.2d 456, 457 (9th Cir. 1979); *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1108, 1114 (9th Cir. 1979); *Local Union No. 428 v. Silva*, 96 Cal.App.3d 751, 754-55, 158 Cal.Rptr. 78, 81 (1979).

In addition, the views of the Trustees themselves, one-half appointed by Local 12 and one-half appointed by employer associations, should be treated as extrinsic evidence that short form agreements negotiated by Local 12 are intended and treated as continuing in effect after modification of the MLA. The Court of Appeals treated the views of the Trustees as merely the "Union's contention" (*App.* A, p. 10), while such views should be accorded at least evidentiary significance, if not the deference shown for the views of joint grievance committees. *Humphrey v. Moore*, 375 U.S. 335, 351, 84 S.Ct. 363, 372 (1964); *General Drivers, etc., Local Union No. 89 v. Riss & Co.*, 372 U.S. 517, 519, 83 S.Ct. 789, 791 (1963).

The Court of Appeals failed to consider this extrinsic evidence as required for interpreting the collective bargaining agreement or in the proper context of reviewing summary judgment.

> "[In] reviewing a summary judgment, we need decide only whether any genuine issue of material fact remains for trial and whether the substantive law was correctly applied." *Inland City Express, Inc. v. Diamond National Corporation*, 524 F.2d 753, 754 (9th Cir. 1975).

The Court of Appeals did not deal at all with determining whether the extrinsic evidence of proper contract interpretation was sufficient to raise a genuine issue of material fact requiring a trial.

By dealing only with the wording of Article II of the short form agreement, the Court of Appeals arrived at a truly nonsensical interpretation: that it is Local 12's territory or jurisdiction, or both, and not the MLA, that is to be "recognized, modified and renewed from time to time through collective bargaining between the UNION and the applicable multiple-employer group".

In its concern for adopting a contractual interpretation which would protect Coughlin from "purchasing 'a pig in a poke' " (*App.* A, p. 6), the Court of Appeals failed to recognize the very astute business reasons why an employer chooses to sign a short form agreement incorporating the MLA which is to be renegotiated. The short form employer signs his collective bargaining agreement in advance and thereby shields his own company from work stoppages during the renegotiation of the MLA, while still being assured of receiving the most favorable terms that the employer associations can negotiate with Local 12.

Conclusion.

The petition for a writ of certiorari should be granted.

March 1980.

Respectfully submitted,

WAYNE JETT,

Counsel for Petitioners.

APPENDIX A.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

Joseph H. Seymour, etc., et al., Plaintiffs-Appellants, vs. Coughlin Company, a California corporation, Defendant-Appellee. No. 76-3701.

Filed: Oct. 5, 1979.

Appeal from the United States District Court For the Central District of California.

Before: TRASK and WALLACE, Circuit Judges, and SOLOMON,* District Judge.

WALLACE, Circuit Judge:

Trustees of various pension funds and trusts appeal from a summary judgment entered against them by the district court in their action, as third party beneficiaries, for breach of contract against Coughlin Company (Coughlin). The trustees contend that the district judge improperly failed to follow the statutory mandate of the National Labor Relations Act, and improperly construed the collective bargaining agreement between the International Union of Operating Engineers, Local Union No. 12 (the Union) and Coughlin. We affirm.

I

In 1967, Coughlin executed a "short form" collective bargaining agreement with the Union. The short form agreement incorporated substantially all of the terms, including those governing pension fund contributions, of the Master Labor Agreement (MLA), a multiple employer collective bargaining agreement negotiated between the Union and several Southern California general contractors' associations (contractors). The MLA had a term of four years and was to expire on July 1, 1969. Coughlin was not a party to the

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*Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

MLA at the time it executed the short form agreement with the Union.

In accordance with the terms of the MLA, the Union gave timely written notice to the contractors of its desire to negotiate modifications to the terms of the MLA. Neither the Union nor Coughlin gave written notice to the other party of a desire to terminate or modify the short form agreement between them.

The district judge found that the contractors and the Union "entered into a new and different [MLA] for the period 1969-1974 which substantially changed, modified and amended the prior [MLA]." The district judge also found that after the July 1, 1969, expiration of the original MLA, Coughlin requested the Union to dispatch a worker to it. The Union did so, and Coughlin later reported hours of employment, and paid fringe benefit contributions on behalf of the worker to the trustees for the period October-December 1969. Coughlin paid these contributions pursuant to the provisions of the modified, 1969-1974 MLA which was then in effect.

The district judge concluded that, because neither party to the short form agreement had given notice of intent to terminate or modify it, the agreement "was effective by the provisions of its Article V for the term of the MLA 1965-69 and any 'renewals or extensions' thereof." Pursuant to his finding that the modified, 1969-1974 MLA was "new and different," the district judge concluded that the original MLA was not extended or renewed, and that the short form agreement terminated simultaneously with the original MLA on July 1, 1969.

The trustees contend that the district judge erred because he failed to give effect to the alleged mandate of section 8(d) of the National Labor Relations Act (Act), 29 U.S.C.

§158(d), and because he allegedly misconstrued the termination provision of the short form agreement.

II

The trustees argue that section 8(d) of the Act effectively prevents termination of any collective bargaining agreement until one of the parties to such an agreement serves a written notice of termination upon the other party in accordance with that section. Because it was not timely raised, however, we do not reach the merits of this argument. As the trustees concede, they did not present this argument to the district judge in any form until, after the district judge had already tentatively ruled in the case, they filed their objections to the proposed findings of fact and conclusions of law. The section 8(d) issue was not included in the pretrial conference order. Neither did the trustees make any motion to amend this order. Coughlin had no meaningful opportunity to argue the question in the district court and the district judge thus appropriately chose not to rule on the issue. *See* Fed. R. Civ. P. 16.

"As a general rule, 'a federal appellate court does not consider an issue not passed upon below.' " *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). *Accord, e.g., Roberson v. United States*, 382 F.2d 714, 718 (9th Cir. 1967). *See also McCaffrey v. Diversified Land Co.*, 564 F.2d 1241, 1243-44 (9th Cir. 1977) (per curiam). While we have recognized a number of exceptions to this rule, none is applicable here.

In *Patrin*, we observed that where a recent change in the law results in a new theory or issue to be asserted, we may, in our discretion, allow a party to raise that theory or issue in the interests of justice. 575 F.2d at 712. Section 8(d), however, is not of recent origin, nor is there a recent change

in its interpretation pertinent to the issues involved in this case.

We stated in *Patrin* that we also may consent to consider an issue which "is purely one of law and either does not affect or rely upon the factual record developed by the parties." *Id.* Although the question at issue here does appear to fit this guideline, we emphasized in *Patrin* that this exception is inapplicable when the party against whom the issue is raised may be prejudiced by it. "Thus, if he might have tried his case differently either by developing new facts in response to or advancing distinct legal arguments against the issue," we should not consider a theory or issue not properly raised in the district court. *Id.* As the arguments before us demonstrate, the trustees' section 8(d) position raises new legal questions which require distinct arguments regarding the scope and applicability of that section.

The exceptions to the rule that issues not considered in the district court may not be raised on appeal are designed to prevent what we have termed "manifest miscarriage[s] of justice," *McCaffrey v. Diversified Land Co., supra,* 564 F.2d at 1243-44. The trustees have not demonstrated that consideration of their new theory is called for either by the exceptions to the rule or by the principle which lies behind them. The question is not preserved for appeal under these circumstances.

III

The trustees' second contention is that the district judge improperly construed the short form agreement. While both parties contend that the agreement is unambiguous, each contends for an interpretation favorable to its own position. As observed earlier, the district judge concluded that Article V of the short form agreement controlled the termination of that agreement. He ruled that, pursuant to the terms of

Article V, significant modification of the original MLA terminated that agreement and, consequently, the short form agreement, as well.

Article V of the short form agreement states:

> This Agreement shall become effective as of the date shown above and *shall continue in effect for the same term as the applicable multiple-employer labor agreements and for any renewals or extensions thereof,* unless either party shall give written notice to the other party, at least sixty (60) days prior to the termination date of the appropriate multiple-employer agreement, of its desire to terminate.

(Emphasis supplied.) The trustees argue that Article V is modified by Article II of the short form agreement, which provides in part:

> The EMPLOYER, not being signatory to any recognized Operating Engineers' multiple-employer agreement, hereby agrees to accept and be bound by all of the terms and conditions of multiple-employer agreements applicable to the EMPLOYER'S operations and in effect in the area in which the work is performed as recognized, modified and renewed from time to time through collective bargaining between the UNION and the applicable multiple-employer group.

Specifically, the trustees suggest that Article II effectively continues the short form agreement in full force and effect even in the face of a modification of the MLA. Coughlin counters that Article II is "jurisdictional," and speaks only to possible modifications of territorial and jurisdictional assignments as regards coverage of particular work units by various collective bargaining agreements.

The district judge apparently agreed with Coughlin's position, for he did not make any reference to Article II in his

findings of fact and conclusions of law. We cannot find fault with the district judge's interpretation of the contract. Article V is clear. While Article II may not be as clear, it is strongly suggestive of the interpretation favored by Coughlin. Indeed, we find no reason to believe that Article II has any bearing on Article V, which the trustees concede is the termination clause of the agreement. Article II speaks of "multiple-employer agreements applicable to the EMPLOYER'S operations and in effect in the area in which the work is performed *as recognized, modified and renewed* from time to time . . . ." (Emphasis supplied.) Article V speaks of the short form agreement continuing "in effect for *the same term* as the applicable multiple-employer labor agreements and *for any renewals or extensions thereof.* . . ." (Emphasis supplied.) The terminology is quite different. Moreover, it may reasonably be inferred that the purposes of the clauses are distinct, for they are located in different portions of the agreement, and neither clause makes any reference to the other. We agree with the district judge that the agreement "[does] not appear to be unclear in . . . intent or effect." Indeed, where the agreement construed otherwise, Coughlin would, so to speak, be purchasing "a pig in a poke." He would be bound by the terms of any new MLA, no matter how different the terms of the modified agreement from those of the original, and although he had no part in negotiations for that new agreement.

While, as the trustees suggest, Coughlin could have given 60 days' notice prior to termination of the original MLA, this would require him to take preemptive action, even if he is satisfied with the terms of the original agreement and hopes that it is renewed. It seems more reasonable, as the district judge found and as the clear language of Article V indicates, that the parties intended for the short form agreement to terminate if the original MLA was not renewed or

extended, and instead was modified. Although the parties could perhaps have more clearly expressed their intent, the district judge's construction of the short form agreement appears to reflect the parties' intent. Ordinarily, we will not set aside such an interpretation on appeal. *See Hart v. California Pac. Title & Trust Co.*, 136 F.2d 430, 432 (9th Cir. 1943).

IV

The trustees next contend that the district judge improperly concluded that the modified MLA was not a renewal or an extension of the original MLA, pursuant to Article V of the short form agreement. In this regard, the trustees suggest that the district judge incorrectly relied upon *East Bay Union of Machinists, Local 1304 v. Fibreboard Paper Prods. Corp.*, 285 F. Supp. 282 (N.D. Cal. 1968), *aff'd mem.*, 435 F.2d 556 (9th Cir. 1970).

In *Fibreboard,* the union sought damages for an alleged breach of a collective bargaining agreement. An important question was whether the notice of modification sent by the union to the employer, prevented the agreement from being automatically renewed. *Id.* at 283-84. The agreement contained a clause which provided that the agreement would be considered "renewed from year to year" unless one of the parties gave notice of intent to modify or to cancel. *Id.* at 284. The second paragraph of that clause provided that within 15 days of such reopening notice, the opening party would submit a list of proposed modifications, and that all other sections of the agreement would "remain in full force and effect." *Id.*

The district court concluded:

> To renew in the present context, means to "begin again" or "continue in force" the old contract. WEBSTER'S INTERNATIONAL DICTIONARY, Una-

> bridged, p. 2109 (2d ed. 1950). Once one of the parties has stated his desire to modify the *old* contract, that contract cannot obviously be "renewed," since there would in effect be a *different* or *new* contract. This is the clear meaning of the first paragraph of the [clause].

Id. at 287 (emphasis in original). The court also decided that the language of the second paragraph of the clause, regarding terms remaining in "full force and effect," was intended by the parties to limit the scope of negotiations prior to termination of the agreement, as determined by the first paragraph of the clause. *Id.*

The trustees contend that *Fibreboard* is not authority here because, while notice was given in that case, neither party to the short form agreement before us here gave notice to the other. This argument misses the point. The short form agreement at issue here referred to "renewals or extensions" *of the MLA*, not of the short form agreement.[1] In this case, notice was given pursuant to the terms of the MLA. Therefore, the district judge could properly look to *Fibreboard* for guidance.

The trustees' reliance upon *NLRB v. International Hod Carriers Local 300*, 287 F.2d 605 (9th Cir. 1961), and *Calhoun v. Bernard*, 333 F.2d 739 (9th Cir. 1964), *on appeal from remand*, 359 F.2d 400 (9th Cir. 1966), is to

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[1]The trustees do not contend that the term "extension" used in the short form agreement means anything substantially different from the word "renewal." Indeed, it seems clear that both of these terms refer to some sort of revitalization of the original MLA.

no avail.[2] The trustees suggest that these cases demonstrate that an agreement containing an automatic renewal provision cannot be terminated without notice. We disagree.

Hod Carriers, which arose out of an unfair labor practice proceeding before the Board, rather than an action for breach of contract, only held that automatic renewal provisions were valid, and that pursuant to them, a contract could remain in effect for a significant period of time. 287 F.2d at 610. In that case, the short form agreement was "absolutely silent as to the existence or incorporation of . . . a master contract." *Id.* at 608. Rather, the agreement referred only "to 'the wage scales, classifications and working rules of the Union having jurisdiction,' " and similar general circumstances regarding union procedures and working conditions. *Id.* Moreover, because of the failure to make any reference to a master contract, the agreement was clear that it would "remain in effect until either party [gave] notice of intent to terminate." *Id.* Under those circumstances, renewal or modification of any master agreement was irrelevant to the life of the short form agreement then at issue.

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[2]Subsequent to submission of this case for decision, we decided *Waggoner v. C & D Pipeline Co.*, No. 77-3949 (9th Cir. July 24, 1979). In *Waggoner*, C & D Pipeline Company had signed only a short form agreement, which incorporated the terms of a master agreement. Subsequently, the master agreement was amended. While we implicitly held that the short form agreement before us there continued in force despite the amendment of the master agreement, and that the terms of the amended master agreement were incorporated into that short form agreement, we do not find that case dispositive.

In *Waggoner*, the parties apparently did not raise, and certainly we never considered, the question whether the short form agreement at issue there could or would terminate upon notice of intent to seek amendment of the relevant master agreement. Most important, however, we cannot be certain that the termination clause of the short form agreement in *Waggoner* is identical or even similar to the termination clause of the agreement before us here.

The circumstances of the *Calhoun* cases are also distinguishable from those before us here. Quite apart from blindly binding himself to unknown future agreements, the employer there "was informed that, by executing [the short form agreement], he was bound by the 1954 master agreement and the 1957 and 1959 amendments." 359 F.2d at 401. Moreover, the short form agreement there plainly provided (after elimination of a typographical error) that the employer would be bound by the master agreement and "any modification or changes" therein. *See* 359 F.2d at 401; 333 F.2d at 740.

V

Finally, contrary to the Union's contention, Coughlin's decision to provide contributions to the Union after July 1, 1969 (the termination date of the original MLA), pursuant to the terms of the new, modified MLA, does not demonstrate that Coughlin was bound by or believed that it was bound by the terms of the new MLA. Certainly, this is not sufficient to demonstrate that the district judge erroneously construed the agreement.

VI

Therefore, the district judge did not err in concluding that the short form agreement between Coughlin and the Union terminated with the termination of the original MLA, July 1, 1969.

AFFIRMED.

APPENDIX B.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Joseph H. Seymour, Trustee, et al., Plaintiffs, vs. Coughlin Company, a California corporation, and D. W. Coughlin, dba Coughlin Company, Defendants. No. CV 75-1035-EC.

Filed: Oct. 8, 1976.

Motions by both parties for summary judgment were heard on September 21, 1976. The defendant's motion was granted and the Court now makes its Findings of Fact and Conclusions of Law, as follows:

FINDINGS OF FACT

1. Plaintiffs and their successors are the Trustees of the Operating Engineers Health and Welfare Fund, the Operating Engineers Pension Trust, the Operating Engineers Vacation-Holiday Savings Trust and the Operating Engineers Journeyman and Apprentice Training Trust (hereafter Trustees).

2. Defendant Coughlin Company (hereafter Coughlin) is a California corporation which was incorporated in 1953. The present sole stockholder is Patrick J. Coughlin, son of D. W. Coughlin.

3. On August 3, 1967, defendant Coughlin, through its president and sole stockholder, D. W. Coughlin, executed a written short-form Collective Bargaining Agreement with the International Union of Operating Engineers, Local Union No. 12 (hereafter Local 12). Coughlin's agreement incorporated by reference the terms and conditions of a multiple-employer Collective Bargaining Agreement, commonly known as the Master Labor Agreement (hereafter MLA), which was negotiated between Local 12 and the Contractor's Associations (hereafter Contractors) and bound

Coughlin to the 1965 MLA for the term of said MLA 1965-1969 as provided in Article V of the short-form Agreement.

4. The Master Labor Agreement in effect on the date Coughlin executed the short-form Agreement continued in effect by its terms until July 1, 1969. Coughlin was not a party to the Master Labor Agreement.

5. On or before 60 days prior ot July 1, 1969, Local 12 gave written notice to the Contractors, in accordance with Article XIV of the MLA, of its desire to negotiate modifications to the terms of the MLA. Neither Local 12 nor Coughlin has given written notice to the other party of a desire to terminate or modify the short-form Collective Bargaining Agreement between them.

6. That the Southern California Chapter of the Associated General Contractors of America, Building Contractors Association of California, Inc., Engineering and Grading Contractors Association, Inc., and Home Builders Association, collective bargaining representatives for the contractors, and the International Union of Operating Engineers, Local Union No. 12, affiliated with the Building and Construction Trades Department, AFL-CIO, entered into a new and different Master Labor Agreement for the period 1969-1974 which substantially changed, modified and amended the prior Master Labor Agreement of July 1, 1965, effective for the period 1965-1969.

7. After July 1, 1969, Coughlin requested that Local 12 dispatch a workman to Coughlin, and Coughlin thereafter reported hours of employment and paid fringe benefit contributions to the Trustees for the period October-December, 1969, on behalf of that workman in accordance with the provisions of the Master Labor Agreement 1969-74, then in effect.

8. Any Finding of Fact which is, in effect, a Conclusion of Law shall be so deemed and any Conclusion of Law which is, in effect, a Finding of Fact shall be so deemed.

CONCLUSIONS OF LAW

1. That the new Master Labor Agreement 1969-1974, which became effective July 1, 1969, terminated and supplanted all previous Master Labor Agreements up to and including June 30, 1969.

2. That because of the implementation of the new MLA dated July 1, 1969, Coughlin's obligation under the MLA dated July 1, 1965, made binding by Article V of the short-form Collective Bargaining Agreement executed by D. W. Coughlin on behalf of Coughlin Company on August 3, 1967, was thereby terminated.

3. That all obligations of Coughlin Company to pay benefits to Local 12 Operating Engineers Journeyman and Apprentice Training Trust, Health and Welfare Fund, Pension Trust, and Vacation-Holiday Savings Trust, under the MLA 1965-69, were terminated as of July 1, 1969.

4. That Coughlin Company, subsequent to July 1, 1969, had no duty, obligation, confidential relationship or fiduciary duty, under the short-form Agreement to report any employees or any hours worked by any employees to Local 12 of the Operating Engineers, or any Trusts of the Operating Engineers.

5. No notice having been given by either party to the short-form Agreement to terminate or modify it, that Agreement was effective by the provisions of its Article V for the term of the MLA 1965-69 and any "renewals or extensions" thereof. The MLA 1965-69 was *not extended or renewed* under the continuance from year to year provisions of Article XIV of the MLA 1965-69, or otherwise. The MLA for 1969-1974 was a *different* or *new* agreement and, therefore,

the short-form Agreement terminated July 1, 1969. *East Bay Union of Machinists, Local 1304 vs. Fibreboard Paper Products Corp.*, 285 F. Supp. 282, 287 (N.D. Cal. 1968), Affrm'd 435 F.2d 556 (9th Cir. 1968); *McKeon v. Giusto*, 280 P.2d 782, 783-84 (Cal. 1955). The 1969-74 MLA was the result of negotiations in accordance with Article XIV of the 1965-69 MLA to "change, modify or amend," thus terminating the 1965-69 MLA. The new MLA 1969-74 was therefore not an "extension" or "renewal" of the old Agreement. The agreements involved do not appear to be unclear in their intent or effect but, if so, the interpretation should be most strongly against the draftsman, in this case Local 12. California Civil Code 1654; *County of Alameda v. Southern Pacific Company*, 11 Cal.Rptr. 751, 757 (Cal. 1961).

6. Based on the Findings of Fact and Conclusions of Law heretofore enumerated, defendant Coughlin Company is entitled to summary judgment.

DATED: Oct. 8, 1976.

/s/ E. Avery Crary,
E. AVERY CRARY
Senior United States District Judge

APPENDIX C.

Judgment Granting Motion for Summary Judgment.

United States District Court, Central District of California.

Joseph H. Seymour, C. Wm. Burke, Richard L. Corbit, John L. Connolly, Harold Edwards, Howard C. Dennis, Donald E. Mier, Alexander Rados, William Schmidt, William C. Waggoner, Jerald B. Laird and Richard Gannon, each in his respective capacity as Trustee of the Operating Engineers Health & Welfare Fund; Joseph H. Seymour, John L. Connolly, Richard L. Corbit, C. V. Holder, Harold Edwards, Howard C. Dennis, Donald E. Mier, James J. Kirst, William C. Waggoner, John C. Maxwell, C. William Burke, Richard Gannon, Kenneth J. Bourguignon and Alfred Harrison, each in his respective capacity as Trustee of the Operating Engineers Pension Trust; Joseph H. Seymour, Howard C. Dennis, Richard L. Corbit, C. William Burke, Harold Edwards, Alexander Rados, Donald E. Mier, C. Irwin T. Johnson, William C. Waggoner, James J. Kirst, Richard Gannon and Jerald B. Laird, each in his respective capacity as Trustee of the Operating Engineers Vacation-Holiday Savings Trust; Joseph H. Seymour, Alexander Rados, Richard L. Corbit, William Schmidt, Richard Gannon, Howard C. Dennis, Jerry Trent, Robert R. Moodie, Alan Roberts, C. Irwin T. Johnson, A Paul Schenk and Harold Edwards, each in his respective capacity as Trustee of the Southern California Operating Engineers Apprentice Training Trust, Plaintiffs, vs. Coughlin Company, a California corp., and D. W. Coughlin, dba Coughlin Company, Defendants. No. CV 75-1035-EC.

FILED: Oct. 8, 1976.

This cause came on regularly for hearing on September 21, 1976, in Courtroom No. 1 of the above-entitled Court before the Honorable E. Avery Crary, Senior United States

District Judge, presiding, on defendant Coughlin Company's motion for summary judgment, plaintiffs appearing by Timothy P. Sullivan and defendant Coughlin Company appearing by Jackson E. Chandler, and the cause having been argued and submitted for decision and the Court having caused to be made and filed its written Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED and DECREED that plaintiffs Joseph H. Seymour, et al., take nothing by their complaint from defendant Coughlin Company, that the complaint is hereby dismissed as to Coughlin Company and that the defendant Company recover from plaintiffs its costs of suit.

DATED: Oct. 8, 1976.

/s/ E. Avery Crary,
E. AVERY CRARY,
Senior United States District Judge.

APPENDIX D.

Order.

United States Court of Appeals for the Ninth Circuit.

Joseph H. Seymour, etc., et al., Plaintiffs-Appellants, vs. Coughlin Company, a California corporation, Defendant-Appellee. No. 76-3701.

FILED: Dec. 28, 1979.

Before: TRASK and WALLACE, Circuit Judges, and SOLOMON,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.